

ASSEMBLY BILL

No. 1562

Introduced by Assembly Member Gomez

January 29, 2014

An act to amend Section 12945.2 of the Government Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 1562, as introduced, Gomez. Employment: leave.

The Moore-Brown-Roberti Family Rights Act makes it an unlawful employment practice for an employer, as defined, to refuse to grant a request by an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period (1) to bond with a child who was born to, adopted by, or placed for foster care with, the employee, (2) to care for the employee's parent, spouse, or child who has a serious health condition, as defined, or (3) because the employee is suffering from a serious health condition rendering him or her unable to perform the functions of the job. Under the act, an employee is required to have more than 12 months of service with the employer and at least 1,250 hours of service with the employer during the previous 12-month period.

The act authorizes an employer to refuse to reinstate an employee returning from leave under specified circumstances.

This bill would designate an eligible employee as an entitled employee. The bill, with respect to a public or private school employee, instead of requiring 1,250 hours of service with the employer during the previous 12-month period, would require service of at least 60% of a full-time equivalent position during the previous 12-month period.

The bill would exempt public and private school employees from that reinstatement exception.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 12945.2 of the Government Code is
2 amended to read:

3 12945.2. (a) Except as provided in subdivision (b), it ~~shall be~~
4 ~~is~~ an unlawful employment practice for ~~any employer, as defined~~
5 ~~in paragraph (2) of subdivision (e), an employer~~ to refuse to grant
6 a request by ~~any employee with more than 12 months of service~~
7 ~~with the employer, and who has at least 1,250 hours of service~~
8 ~~with the employer during the previous 12-month period, an entitled~~
9 ~~employee~~ to take up to a total of 12 workweeks in any 12-month
10 period for family care and medical leave. Family care and medical
11 leave requested pursuant to this subdivision shall not be deemed
12 to have been granted unless the employer provides the employee,
13 upon granting the leave request, a guarantee of employment in the
14 same or a comparable position upon the termination of the leave.
15 The commission shall adopt a regulation specifying the elements
16 of a reasonable request.

17 (b) Notwithstanding subdivision (a), it ~~shall~~ ~~is not be~~ an unlawful
18 employment practice for an employer to refuse to grant a request
19 for family care and medical leave by an employee if the employer
20 employs ~~less~~ *fewer* than 50 employees within 75 miles of the
21 worksite where that employee is employed.

22 (c) For purposes of this section:

23 (1) “Child” means a biological, adopted, or foster child, a
24 stepchild, a legal ward, or a child of a person standing in loco
25 parentis who is either of the following:

26 (A) Under 18 years of age.

27 (B) An adult dependent child.

28 (2) “Employer” means either of the following:

29 (A) Any person who directly employs 50 or more persons to
30 perform services for a wage or salary.

31 (B) The state, and any political or civil subdivision of the state
32 and cities.

1 (3) “Entitled employee” means an employee with more than 12
2 months of service with the employer, and who complies with one
3 of the following:

4 (A) Except as specified in subparagraph (B), has at least 1,250
5 hours of service with the employer during the previous 12-month
6 period.

7 (B) With respect to a public or private school employee, has
8 served at least 60 percent of a full-time equivalent position during
9 the previous 12-month period.

10 ~~(3)~~

11 (4) “Family care and medical leave” means any of the following:

12 (A) Leave for reason of the birth of a child of the employee, the
13 placement of a child with an employee in connection with the
14 adoption or foster care of the child by the employee, or the serious
15 health condition of a child of the employee.

16 (B) Leave to care for a parent or a spouse who has a serious
17 health condition.

18 (C) Leave because of an employee’s own serious health
19 condition that makes the employee unable to perform the functions
20 of the position of that employee, except for leave taken for
21 disability on account of pregnancy, childbirth, or related medical
22 conditions.

23 ~~(4)~~

24 (5) “Employment in the same or a comparable position” means
25 employment in a position that has the same or similar duties and
26 pay that can be performed at the same or similar geographic
27 location as the position held prior to the leave.

28 ~~(5)~~

29 (6) “FMLA” means the federal Family and Medical Leave Act
30 of 1993 (P.L. 103-3).

31 ~~(6)~~

32 (7) “Health care provider” means any of the following:

33 (A) An individual holding either a physician’s and surgeon’s
34 certificate issued pursuant to Article 4 (commencing with Section
35 2080) of Chapter 5 of Division 2 of the Business and Professions
36 Code, an osteopathic physician’s and surgeon’s certificate issued
37 pursuant to Article 4.5 (commencing with Section 2099.5) of
38 Chapter 5 of Division 2 of the Business and Professions Code, or
39 an individual duly licensed as a physician, surgeon, or osteopathic

1 physician or surgeon in another state or jurisdiction, who directly
2 treats or supervises the treatment of the serious health condition.

3 (B) Any other person determined by the United States Secretary
4 of Labor to be capable of providing health care services under the
5 FMLA.

6 ~~(7)~~

7 (8) “Parent” means a biological, foster, or adoptive parent, a
8 stepparent, a legal guardian, or other person who stood in loco
9 parentis to the employee when the employee was a child.

10 ~~(8)~~

11 (9) “Serious health condition” means an illness, injury,
12 impairment, or physical or mental condition that involves either
13 of the following:

14 (A) Inpatient care in a hospital, hospice, or residential health
15 care facility.

16 (B) Continuing treatment or continuing supervision by a health
17 care provider.

18 (d) An employer shall not be required to pay an employee for
19 any leave taken pursuant to subdivision (a), except as required by
20 subdivision (e).

21 (e) An employee taking a leave permitted by subdivision (a)
22 may elect, or an employer may require the employee, to substitute,
23 for leave allowed under subdivision (a), any of the employee’s
24 accrued vacation leave or other accrued time off during this period
25 or any other paid or unpaid time off negotiated with the employer.
26 If an employee takes a leave because of the employee’s own serious
27 health condition, the employee may also elect, or the employer
28 may also require the employee, to substitute accrued sick leave
29 during the period of the leave. However, an employee shall not
30 use sick leave during a period of leave in connection with the birth,
31 adoption, or foster care of a child, or to care for a child, parent, or
32 spouse with a serious health condition, unless mutually agreed to
33 by the employer and the employee.

34 (f) (1) During any period that an ~~eligible~~ *entitled* employee
35 takes leave pursuant to subdivision (a) or takes leave that qualifies
36 as leave taken under the FMLA, the employer shall maintain and
37 pay for coverage under a “group health plan,” as defined in Section
38 5000(b)(1) of the Internal Revenue Code, for the duration of the
39 leave, not to exceed 12 workweeks in a 12-month period,
40 commencing on the date leave taken under the FMLA commences,

1 at the level and under the conditions coverage would have been
2 provided if the employee had continued in employment
3 continuously for the duration of the leave. Nothing in the preceding
4 sentence shall preclude an employer from maintaining and paying
5 for coverage under a “group health plan” beyond 12 workweeks.
6 An employer may recover the premium that the employer paid as
7 required by this subdivision for maintaining coverage for the
8 employee under the group health plan if both of the following
9 conditions occur:

10 (A) The employee fails to return from leave after the period of
11 leave to which the employee is entitled has expired.

12 (B) The employee’s failure to return from leave is for a reason
13 other than the continuation, recurrence, or onset of a serious health
14 condition that entitles the employee to leave under subdivision (a)
15 or other circumstances beyond the control of the employee.

16 (2) (A) Any employee taking leave pursuant to subdivision (a)
17 shall continue to be entitled to participate in employee health plans
18 for any period during which coverage is not provided by the
19 employer under paragraph (1), employee benefit plans, including
20 life insurance or short-term or long-term disability or accident
21 insurance, pension and retirement plans, and supplemental
22 unemployment benefit plans to the same extent and under the same
23 conditions as apply to an unpaid leave taken for any purpose other
24 than those described in subdivision (a). In the absence of these
25 conditions an employee shall continue to be entitled to participate
26 in these plans and, in the case of health and welfare employee
27 benefit plans, including life insurance or short-term or long-term
28 disability or accident insurance, or other similar plans, the employer
29 may, at his or her discretion, require the employee to pay
30 premiums, at the group rate, during the period of leave not covered
31 by any accrued vacation leave, or other accrued time off, or any
32 other paid or unpaid time off negotiated with the employer, as a
33 condition of continued coverage during the leave period. However,
34 the nonpayment of premiums by an employee shall not constitute
35 a break in service, for purposes of longevity, seniority under any
36 collective bargaining agreement, or any employee benefit plan.

37 ~~For~~

38 (B) *For* purposes of pension and retirement plans, an employer
39 shall not be required to make plan payments for an employee
40 during the leave period, and the leave period shall not be required

1 to be counted for purposes of time accrued under the plan.
2 However, an employee covered by a pension plan may continue
3 to make contributions in accordance with the terms of the plan
4 during the period of the leave.

5 (g) During a family care and medical leave period, the employee
6 shall retain employee status with the employer, and the leave shall
7 not constitute a break in service, for purposes of longevity, seniority
8 under any collective bargaining agreement, or any employee benefit
9 plan. An employee returning from leave shall return with no less
10 seniority than the employee had when the leave commenced, for
11 purposes of layoff, recall, promotion, job assignment, and
12 seniority-related benefits such as vacation.

13 (h) If the employee's need for a leave pursuant to this section
14 is foreseeable, the employee shall provide the employer with
15 reasonable advance notice of the need for the leave.

16 (i) If the employee's need for leave pursuant to this section is
17 foreseeable due to a planned medical treatment or supervision, the
18 employee shall make a reasonable effort to schedule the treatment
19 or supervision to avoid disruption to the operations of the employer,
20 subject to the approval of the health care provider of the individual
21 requiring the treatment or supervision.

22 (j) (1) An employer may require that an employee's request
23 for leave to care for a child, a spouse, or a parent who has a serious
24 health condition be supported by a certification issued by the health
25 care provider of the individual requiring care. That certification
26 shall be sufficient if it includes all of the following:

27 (A) The date on which the serious health condition commenced.

28 (B) The probable duration of the condition.

29 (C) An estimate of the amount of time that the health care
30 provider believes the employee needs to care for the individual
31 requiring the care.

32 (D) A statement that the serious health condition warrants the
33 participation of a family member to provide care during a period
34 of the treatment or supervision of the individual requiring care.

35 (2) Upon expiration of the time estimated by the health care
36 provider in subparagraph (C) of paragraph (1), the employer may
37 require the employee to obtain recertification, in accordance with
38 the procedure provided in paragraph (1), if additional leave is
39 required.

1 (k) (1) An employer may require that an employee's request
2 for leave because of the employee's own serious health condition
3 be supported by a certification issued by his or her health care
4 provider. That certification shall be sufficient if it includes all of
5 the following:

6 (A) The date on which the serious health condition commenced.

7 (B) The probable duration of the condition.

8 (C) A statement that, due to the serious health condition, the
9 employee is unable to perform the function of his or her position.

10 (2) The employer may require that the employee obtain
11 subsequent recertification regarding the employee's serious health
12 condition on a reasonable basis, in accordance with the procedure
13 provided in paragraph (1), if additional leave is required.

14 (3) (A) In any case in which the employer has reason to doubt
15 the validity of the certification provided pursuant to this section,
16 the employer may require, at the employer's expense, that the
17 employee obtain the opinion of a second health care provider,
18 designated or approved by the employer, concerning any
19 information certified under paragraph (1).

20 (B) The health care provider designated or approved under
21 subparagraph (A) shall not be employed on a regular basis by the
22 employer.

23 (C) In any case in which the second opinion described in
24 subparagraph (A) differs from the opinion in the original
25 certification, the employer may require, at the employer's expense,
26 that the employee obtain the opinion of a third health care provider,
27 designated or approved jointly by the employer and the employee,
28 concerning the information certified under paragraph (1).

29 (D) The opinion of the third health care provider concerning
30 the information certified under paragraph (1) shall be considered
31 to be final and shall be binding on the employer and the employee.

32 (4) As a condition of an employee's return from leave taken
33 because of the employee's own serious health condition, the
34 employer may have a uniformly applied practice or policy that
35 requires the employee to obtain certification from his or her health
36 care provider that the employee is able to resume work. Nothing
37 in this paragraph shall supersede a valid collective bargaining
38 agreement that governs the return to work of that employee.

39 (l) ~~It shall be~~ *is* an unlawful employment practice for an
40 employer to refuse to hire, or to discharge, fine, suspend, expel,

1 or discriminate against, any individual because of any of the
2 following:

3 (1) An individual's exercise of the right to family care and
4 medical leave provided by subdivision (a).

5 (2) An individual's giving information or testimony as to his or
6 her own family care and medical leave, or another person's family
7 care and medical leave, in any inquiry or proceeding related to
8 rights guaranteed under this section.

9 (m) This section shall not be construed to require any changes
10 in existing collective bargaining agreements during the life of the
11 contract, or until January 1, 1993, whichever occurs first.

12 (n) The amendments made to this section by Chapter 827 of the
13 Statutes of 1993 shall not be construed to require any changes in
14 existing collective bargaining agreements during the life of the
15 contract, or until February 5, 1994, whichever occurs first.

16 (o) This section shall be construed as separate and distinct from
17 Section 12945.

18 (p) Leave provided for pursuant to this section may be taken in
19 one or more periods. The 12-month period during which 12
20 workweeks of leave may be taken under this section shall run
21 concurrently with the 12-month period under the FMLA, and shall
22 commence the date leave taken under the FMLA commences.

23 (q) In any case in which both parents entitled to leave under
24 subdivision (a) are employed by the same employer, the employer
25 shall not be required to grant leave in connection with the birth,
26 adoption, or foster care of a child that would allow the parents
27 family care and medical leave totaling more than the amount
28 specified in subdivision (a).

29 (r) (1) Notwithstanding subdivision (a), an employer may refuse
30 to reinstate an employee returning from leave to the same or a
31 comparable position if all of the following apply:

32 (A) The employee is a salaried employee who is among the
33 highest paid 10 percent of the employer's employees who are
34 employed within 75 miles of the worksite at which that employee
35 is employed.

36 (B) The refusal is necessary to prevent substantial and grievous
37 economic injury to the operations of the employer.

38 (C) The employer notifies the employee of the intent to refuse
39 reinstatement at the time the employer determines the refusal is
40 necessary under subparagraph (B).

1 (2) In any case in which the leave has already commenced, the
2 employer shall give the employee a reasonable opportunity to
3 return to work following the notice prescribed by subparagraph
4 (C).

5 (3) *This subdivision does not apply to public or private school*
6 *employees.*

7 (s) Leave taken by an employee pursuant to this section shall
8 run concurrently with leave taken pursuant to the FMLA, except
9 for any leave taken under the FMLA for disability on account of
10 pregnancy, childbirth, or related medical conditions. The aggregate
11 amount of leave taken under this section or the FMLA, or both,
12 except for leave taken for disability on account of pregnancy,
13 childbirth, or related medical conditions, shall not exceed 12
14 workweeks in a 12-month period. An employee is entitled to take,
15 in addition to the leave provided for under this section and the
16 FMLA, the leave provided for in Section 12945, if the employee
17 is otherwise qualified for that leave.

18 (t) ~~It shall be~~ *is* an unlawful employment practice for an
19 employer to interfere with, restrain, or deny the exercise of, or the
20 attempt to exercise, any right provided under this section.